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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-260

L. N. McDONALD AND RAYMOND L. LAIRD,
Petitioners,

vs.

SANTA FE TRANSPORTATION COMPANY AND TEAMSTERS FREIGHT, TANK LINE AND AUTOMOBILE INDUSTRY EMPLOYEES, LOCAL UNION NO. 988,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Chamber of Commerce of the United States of America respectfully moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief *amicus curiae* on behalf of the Petitioner in this case. The Petitioner has consented to the filing by letter to this Court.

The Chamber of Commerce of the United States of America is a federation consisting of a membership of over thirty-seven hundred (3,700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of fifty-two thousand (52,000) and an underlying membership of approximately five million (5,000,000)

business firms and individuals. It is the largest association of business and professional organizations in the United States.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to this Court's deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court; *e.g.*, *Franks* v. *Bowman Transportation, Inc., et al.*, No. 74-728 (decision pending); *Geduldig* v. *Aiello, et al.*, 417 U. S. 484 (1974); *Griggs* v. *Duke Power Company*, 401 U. S. 424 (1971); *Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100, etc.*, 43 L. W. 4657 (1975); *Boy's Markets* v. *Retail Clerks Union*, 398 U. S. 235 (1970); *H. K. Porter Co.* v. *N. L. R. B.*, 397 U. S. 99 (1970); *Sears, Roebuck and Co.* v. *Carpet Layers, Local 419*, 397 U. S. 655 (1970); *Super Tire Engineering Co., et al.* v. *McCorkle, et al*, 416 U. S. 115 (1974).

The issue of this case, whether Caucasians have actionable rights under 42 U. S. C. Section 1981, the Civil Act of 1866, and under Title VII to protest racial discrimination is of major interest to the Chamber's membership. The Chamber's members are interested in employing those whose qualifications render them most fit for the work. The decision below impacts upon this interest. Thus, the effect of the decision below is not limited to denying only Caucasians the right to redress racial discrimination directed against them. In a very real sense this decision denies Caucasians equal employment opportunities. That is, by construing the Civil Rights Acts to deny Caucasians protection against racial discrimination in employment, the court has invited agency administrators or private "affirmative action" groups to pressure employers in order to obtain preferences in employment for non-Caucasians. Insofar as such racial preferences would deny employment to qualified Caucasians, these preferences compel reverse discrimination and are attended, apart from constitutional and ethical problems, by increased production costs and reduced efficiency.

Thus, since this Court's decision will exert a substantial impact upon the Chamber's members, the Chamber requests this Court to grant its motion for leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE

SUMMARY OF ARGUMENT*

This case brings into clear focus the question of whether all races are protected against racial discrimination in employment through the invocation of the Civil Rights Acts, or whether these Acts protect only non-Caucasians. The *amicus* contends that the Congressional commentaries relating to these Acts demonstrate that all races may invoke their protection, including Caucasians. Furthermore, the *amicus* contends that only this construction of these Acts comports with the Constitution and responds to the exigencies of society.

---

* The interest of the *amicus* is set forth in the accompanying Motion.

Thus, the *amicus* contends that Caucasians, as well as non-Caucasians, have actionable rights under 42 U. S. C. § 1981 to challenge racial discrimination in the employment area. The precursor of 42 U. S. C. § 1981 was Section 1 of the Civil Rights Act of 1866. This Act was designed to enforce the provisions of the Thirteenth Amendment. The commentaries of the Congressional architects of Amendment Thirteen and the Civil Rights Act of 1866 evince a determination to extend the perimeters of these enactments to encompass the civil rights of all races and to shield these rights from those intrusive forces that would abridge them.

As with the Thirteenth Amendment and Section 1981, so Congress had fashioned Title VII to protect all races—including the Caucasian—from racial discrimination. The Congressional explanations concerning the coverage of that Title, together with the introduction to Executive Order 11375 demonstrate unequivocally that Title VII is underpinned by the concept of meritocracy whereby fitness for the job, rather than immutable personal characteristics, determines who will be employed.

Furthermore, in order to comport with the Constitution, Section 1981 and Title VII must be read to confer actionable rights on Caucasians and non-Caucasians alike. It is submitted that under the Constitution, neither Caucasians nor non-Caucasians are entitled to any advantage in employment nor are subject to any disability because of race. The decision below has ignored this precept and instead has interpreted these Acts to classify persons according to their race and to deny only to Caucasians—because of their race—the right to protest discrimination in employment. Accordingly, the statutory construction of the decision below cannot stand.

Moreover, the effect of the decision below is not limited to denying only Caucasians the right to redress racial discrimination directed against them. In a very real sense, this decision denies Caucasians equal employment opportunities. That is, by construing the Civil Rights Acts to deny Caucasians protection against

racial discrimination in employment, the court permits governmental agencies or private "affirmative action" groups to pressure employers in order to obtain preferences in employment for blacks or other non-Caucasians. Insofar as such racial preferences would deny employment to qualified Caucasians, these preferences compel reverse discrimination. It is submitted that any racial classification is constitutionally impermissible, that no Constitutional right exists for any race to be preferred, and that no governmental purpose—even that of eradicating past general minority discrimination—can justify the imposition of racially oriented hiring preferences that deny employment to qualified persons, Caucasians and others alike, on the basis of race. Yet the decision below attributes to the Civil Rights Acts just such a prohibited purpose and effect.

For all these reasons, the decision below must be reversed. In so doing, this Court should reaffirm its pronouncements of *Griggs* that the right to work depends upon fitness for the work and on an equal right of all, regardless of race to compete in an open market, and does not depend upon membership in a particular racial group; this Court should stress that the Civil Rights Acts command the elimination of racial barriers, not their creation, in order to satisfy a notion as to how society ought to be organized. In view of the decision below, such a restatement is necessary.

ARGUMENT

This case brings into clear focus the question whether all races are protected against racial discrimination in employment through the invocation of the Civil Rights Act, or whether these Acts protect only non-Caucasians. The *amicus* contends that the Congressional commentaries relating to these Acts demonstrate that all races may invoke their protection, including Caucasians. Furthermore, the *amicus* contends that only this construction of these Acts comports with the Constitution and responds to the exigencies of society.

A. Caucasians Have an Actionable Right Under 42 U. S. C. Section 1981 to Challenge Racial Discrimination Directed Against Them.

The question here is whether Caucasians have an actionable right under 42 U. S. C. § 1981 to challenge their discharge for misappropriation of company property when a black employee, who was also charged with misappropriating this property, was not discharged.[1] It is established that Section 1981 proscribes private racial discrimination in employment against blacks by employers and unions. *Johnson* v. *Railway Express Agency, Inc., et al.*, 421 U. S. 454 (1975); *Waters* v. *Wisconsin Steelworkers of International Harvester*, 472 F. 2d 476 (CA 7, 1974). The determination of whether Caucasians enjoy similar protection requires an examination of the Congressional commentaries surrounding the origin of that statutory section.

This necessary historical odyssey begins with the adoption of the Thirteenth Amendment:

> "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or in any place subject to their jurisdiction.
>
> Section 2. Congress shall have power to enforce this Article by appropriate legislation."

This Amendment was designed to establish that the "rights of mankind, without regard to color or race, are respected and protected[,]" and was intended to "make the future safe for the rights of each and every citizen."[2]

1. 42 U. S. C. § 1981 states:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white persons, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other."

2. Cong. Globe, 38th Cong., 1st Sess. 2989-2990, 1202 (1864).

This Court has recognized specifically that the perimeter of the Thirteenth Amendment extends to encompass the rights of all races:

> "It reaches every race and every individual and if in any respect it commits one race to the nation it commits every race and individual thereof. Slavery or involuntary servitude of the Chinese, or the Italian, or of the Anglo-Saxon are as much within its compass as slavery or involuntary servitude of the African." *Hodges* v. *United States*, 203 U. S. 1 (1906).

The enforcing legislation of the Thirteenth Amendment was Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, the precursor of Section 1981. *Johnson* v. *Railway Express Agency, supra.* That bill, the Civil Rights Act of 1866, was "intended to give effect to the Thirteenth Amendment by guaranteeing 'to all persons within the United States practical freedom.' "[3] In explicitly refuting a colleague's assertion that the Civil Rights Bill protected only blacks and not Caucasians, Senator Trumbull positively stated:

> "Sir, this bill applies to white men as well as black men. It declares that all persons in the United States shall be entitled to the same civil rights, the right to the fruit of their own labor, the right to make contracts, the right to buy and sell, and enjoy liberty and happiness; and that is abominable and iniquitous and unconstitutional! Could anything be more monstrous or more abominable than for a member of the Senate to rise in his palce and denounce with such epithets as these a bill, the only object of which is to secure equal rights to all the citizens of the country, a bill that protects a white man just as much as a black man? With what consistency and with what face can a Senator in his place here say to the Senate and the country that this is a bill for the benefit of black men exclusively when there is no such distinction in it, and when the very

3. Cong. Globe, 39th Cong., 1st Sess, 366 (1866), remarks of Senator Trumbull, a principal architect of both this Bill and the Thirteenth Amendment. Buchanan, *The Quest for Freedom: A Legal History of the Thirteenth Amendment*, 12 Hous. L. Rev. 1 at page 18 (1975).

> object of the bill is to break down all discrimination between black men and white men?" Cong. Globe, 39th Cong., 1st Sess., 599 (1866).

With full awareness that the Civil Rights Bill secured the rights of Caucasians as well as of blacks, the Senate passed it in February, 1866.

The House then amended the bill to include—without debate—the phrase "as enjoyed by white citizens." (Cong. Globe 39th Cong. 1st Sess. 1115 (1866)) These words, appearing as they do in Section 1981, have caused some courts, including the court below, to conclude that the 1866 Act as amended and Section 1981 offer nothing to a plaintiff who is himself a Caucasian.[4] This Conclusion is unwarranted as the pertinent legislative history demonstrates. Thus, the phrase, "as enjoyed by white citizens," was introduced in the House by Representative Wilson, who then reaffirmed that the bill preserved the fundamental rights of all persons, regardless of color:

> "Mr. Speaker, if all our citizens were of one race and one color, we would be relieved of most of the difficulties which surround us. This bill would be almost, if not entirely, unnecessary, and if the State, seeing that we have citizens of different races and colors, would but shut their eyes to these differences and legislate so far at least as regards civil rights and immunities, as though all citizens were of one race and color, our troubles as a nation would be well-nigh over. But such is not the case, and *we must do as best we can to protect our citizens, from the highest to the lowest, from the whitest to the blackest, in the enjoyment of the great fundamental rights which belong to all men.*" (Emphasis added) Cong. Globe, 39th Cong., 1st Sess., 1115, 1118 (1866).[5]

4. Comment: *Section 1981 and Private Groups, The Right to Discriminate* v. *Freedom from Discrimination,* 84 Yale L. J. 1441 at 1448, note 40 (1975).

5. The natural rights philosophy underpinning the Civil Rights Bill was convincingly articulated by Representative Lawrence who joined this philosophical concept with that of equal protection of the laws:

> ". . . Legislative powers exist in our system to protect, not destroy, the inalienable rights of man . . . there are two ways in which a State may undertake to deprive citizens of these absolute, inherent and inalienable rights: either by prohibitory laws, or by a failure to protect any one of them." Cong. Globe, 39th Cong., 1st Sess., 1832-1833 (1866).

Thus, the bill's sponsors in the House, just as those in the Senate, articulated that this bill secured the inalienable liberties of all.

When the bill passed the House and was returned to the Senate for concurrence, attention focused upon the added phrase. In the following colloquy between Senators Trumbull and VanWinkle it became apparent that these added words in no way altered congressional intent to protect the rights of all citizens:

> "MR. VAN WINKLE. There seems to be an incongruity in this language to which I wish to call the attention of the chairman of the committee. The clause commences with the words 'and such citizens.' As I understand those words they include all persons who are or can be citizens, white persons and all others. The clause then goes on to provide that 'such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, shall have the same right to make and enforce contracts,' &c., 'as is enjoyed by white citizens.' It seems to me these words are superfluous. The idea is that the rights of all persons shall be equal; and I think the clause, leaving out these words, would attain the object. This is merely a verbal criticism. I think the bill is incongruous in expression as it stands.
>
> "MR. TRUMBULL. I quite agree with the Senator from West Virginia that these words are superfluous. *I do not think they alter the bill.* I think the bill would be better without them, but they have been adopted by the House of Representatives. We did not think they altered the meaning of the bill; and we did not think it worth while to send the bill back just because these words were inserted by the House. They thought there was some importance in them and have inserted them; and *as in the opinion of the committee which examined this matter they did not alter the meaning of the bill,* the committee thought proper to

recommend a concurrence, and I hope the Senate will concur in it." (Emphasis added.)[6]

The Senate then passed the Civil Rights Bill as amended.

This journey through the history encompassing the Civil Rights Act of 1866 unequivocally establishes Congressional acceptation of the principle that the Act was conceived to foster the civil rights of all, including Caucasians, and to shield these rights from those intrusive forces that would abridge them.[7]

Furthermore, 42 U. S. C. § 1982 just as § 1981 is derived from the Civil Rights Act of 1866 and like § 1981 is intended to enforce the Thirteenth Amendment. *Jones* v. *Alfred H. Mayer Co., supra.* Thus, not coincidentially, the language in these two statutory sections is similar, concerning racial discrimination. Section 1981 provides:

> "All persons within the jurisdiction of the United States shall have the same rights . . . to make and enforce contracts . . . as is enjoyed by white citizens."

Section 1982 provides:

> "All citizens of the United States shall have the same rights . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold and convey real and personal property."

This Court in *Jones* v. *Alfred H. Mayer Co., supra,* previously has determined that Section 1982 interdicts all discrimination because of race. In the words of this Court:

> "Section 1982 bars *all* racial discrimination, private as well as public, in the sale or rental of property, . . ." (emphasis in the original) 392 U. S. at 413.

6. Cong. Globe, 39th Cong., 1st Sess. 1413 (1866).

7. The Civil Rights Act of 1866 was reenacted by Section 18 of the Enforcement Act of 1870, 16 Stat. 140, 144, and later codified in Section 1977 of the Revised Statutes of 1874 before becoming 42 U. S. C. § 1981. The reenactment in 1870, following ratification of the Fourteenth Amendment, was intended to eliminate any constitutional question concerning the Act's applicability to the several states. *Jones* v. *Alfred H. Mayer Co.,* 392 U. S. 409, 436.

It follows, due to their common derivation and design, that just as Section 1982 proscribes all racial discrimination in the sale of property, so Section 1981 bans *all* racial discrimination in employment.[8]

B. Caucasians Have Actionable Rights Under Title VII of the Civil Rights Act of 1964 to Challenge Racial Discrimination Directed Against Them.

Title VII as originally enacted, reflected the mainstream of social thought on remedying discriminatory practices. This Court has recognized that the purpose of that enactment was "to assure equality of employment opportunities by eliminating those practices and devises that discriminate on the basis of race, color, religion, sex or national origin." *Alexander* v. *Gardner-Denver Co.,* 415 U. S. 36, 44 (1974). However, Title VII was not intended to disadvantage Caucasians by preferring other groups on the employment scene. Thus, Senator Kuchel, commenting on the proposed bill in 1964, observed that a court "cannot order *preferential hiring* or promotional consideration for any particular race, religion, or other group." (110 Cong.

8. Several lower courts have reached this conclusion. In *Carter* v. *Gallagher,* 452 F. 2d 315, 325 (CA 8, 1971), *cert. den.* 406 U. S. 950 (1972), the court recognized that ". . . Section 1981 and the Fourteenth Amendment proscribes any discrimination in employment based on race, whether the discrimination be against whites or blacks." That court reaffirmed this position in *Brady* v. *Bristol-Meyers, Inc.,* 459 F. 2d 621 (1972). Other courts to reach this conclusion include *Hollander* v. *Sears, Roebuck and Co.,* .... F. Supp. .... (D. Conn. 1975), 10 FEP Cases 473 (Caucasian may maintain an action under Section 1981 against an employer who refused to consider him for employment, allegedly for racially discriminatory reasons); *WRMA Broadcasting Co.* v. *Hawthorne,* 365 F. Supp. 577 (M. D. Ala. 1973) (Caucasian employee may sue under Section 1981 to enjoin blacks from forcing his discharge because of his race); *Central Presbyterian Church* v. *Black Liberation Front,* 303 F. Supp. 894 (E. D. Mo. 1969) (Caucasians allowed to maintain Section 1981 action against black militants who disrupted church services); *Gannon* v. *Action,* 303 F. Supp. 1240 (E. D. Mo. 1969) affirmed on other grounds, 450 F. 2d 1227 (CA 8, 1971) (facts similar to *Central Presbyterian*).

Rec. 6563-64 (1964).) (emphasis added) Senators Clark and Case agreed with this observation:

> "[An employer] would not be obliged—or indeed, permitted—to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier." (110 Cong. Rec. 7217 (1964))

An identical view is acknowledged by Senator Humphrey:

> ". . . There is nothing in [Title VII] that will give any power to the commission or to any court to require hiring, firing, or promotion of employees, in order to meet a racial 'quota' or to achieve a certain racial balance." (110 Cong. Rec. 6549 (1964))

The original determination that Title VII unequivocally prohibits all racial discrimination—whether against non-Caucasians or Caucasians—was reaffirmed by congressional commentaries surrounding the 1972 amendments to that Title. Thus, Senator Javits (who sponsored many bills which culminated in the 1972 amendments) explicitly stated that Title VII was an "antidiscrimination" measure. (118 Cong. Rec. S. 161 (daily ed., January 20, 1972)). Senator Javits thereby acknowledged that color-blindness was the keystone of Title VII and that the Act mandated that race, religion, sex and national origin be irrelevant to securing or retaining employment. Javits' remarks, just as those reflected in the 1964 commentaries, demonstrate that Title VII is underpinned by the concept of meritocracy whereby immutable personal characteristics such as race are not relevant to an individual's employment qualifications.

Congressional determination to attack *all* invidious class prejudice in employment by Title VII is also articulated in the preamble to Executive Order 11375 (amending Executive Order 11246, relating to equal employment opportunity):

> "The Congress, by enacting Title VII of the Civil Rights Act of 1964, enunciated a national policy of equal employment opportunity in private employment, without discrimination because of race, color, religion, sex or national origin.
>
> Executive Order No. 11246 of September 24, 1965, carried forward a program of equal employment opportunity in government employment, employment by federal contractors and subcontractors and employment under federally assisted construction contracts regardless of race, creed, color or national origin."

Thus, as with the Thirteenth Amendment and Section 1981 of the Civil Rights Act, Congress has viewed the protection of Title VII as encompassing all races, including Caucasians.

Congressional intendment that the civil liberties of all be secured by Title VII has been recognized by this Court. In *Griggs* v. *Duker Power Co.*, 401 U. S. 424, 430-431, 436 (1971), this Court stated:

> "[Title VII] does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. Congress has made [job] qualifications the controlling factor, so that race, religion, nationality and sex become irrelevant."

This principle of meritocracy was emphasized in *McDonnell Douglas Corp.* v. *Green*, 411 U. S. 792, 801 (1973), where this Court reaffirmed that the national goal is "fair and racially neutral employment . . . decisions." Finally, dispelling any doubt of the scope of Title VII, this Court in *Johnson* v. *Railway Express Agency*, *supra*, stated that that enactment "creates statutory rights against invidious discrimination in employment and establishes a comprehensive scheme for the vindication of those rights. *Anyone* aggrieved by employment discrimination may lodge a charge with the EEOC." 421 U. S. at pages 457, 458 (emphasis added).

Guided by this Court and the scheme of Title VII, the EEOC has consistently recognized that the Act proscribes racial discrimination against Caucasians, and that Caucasians have substantive rights under the Title to challenge this discrimination. Thus, in finding that an employer transgressed Title VII's prohibitions by refusing to hire a Caucasian because of her race, the Commission stated:

> ". . . Title VII . . . proscribes preferential treatment . . . 'opening the doors long shut to minorities is imperative, but in so doing we must be careful not to close them in the face of others, lest we abandon the basic principle of nondiscrimination that sparked the effort to pry open these doors in the first place.' " (EEOC Decision No. 75-268, (1974), 10 FEP Cases 1502, 1503.[9]

This decision reaffirmed an earlier opinion where the Commission stated:

> ". . . the Commission's congressional mandate [is] to eliminate all practices which operate to disadvantage the employment opportunities of any group protected by Title VII, including Caucasians. As the Supreme Court stated in *Griggs* v. *Duke Power,* 401 U.S. 424 (1971), 'discriminatory preference for any group, minority or majority, is precisely what Congress has proscribed.' " EEOC Decision No. 74-31 (1973), CCH EEOC Decisions ¶ 6404.

The upshot is that this Court, the Congressional commentaries and the Commission have uniformly concluded that Caucasians may secure redress for racial discrimination against them by the invocation of Title VII which commands that no race should ever be accorded preferential treatment over another or granted privileges and prerogatives not given to other races.

9. To the same effect is EEOC decision No. 74-106, 1974 CCH EEOC Decisions ¶ 6427, where the Commission determined that failure to rehire an otherwise qualified caucasian teacher was impermissible race bias where an evaluation based mainly upon the teacher's race was used to disqualify her.

C. To Comport with the Constitution, Section 1981 and Title VII Must Be Read to Confer Actionable Rights on Caucasians and Non-Caucasians Alike.

The constitutional prohibitions of the Fifth and Fourteenth Amendments, just as those of the Thirteenth, are directed against all manifestations of racial discrimination.[10] The clear and preeminent purpose of these Amendments is to eliminate all sources of invidious racial discrimination.[11] Consonant with this unequivocal proscription against all forms of racial discrimination, the Constitution must be forever color-blind in the area of employment.[12] "There is no constitutional right for any race to be preferred. . . . There is no superior person by constitutional standards." *DeFunis* v. *Odegaard*, 416 U. S. 312, at 336-337 (1974), (dissenting opinion of Mr. Justice Douglas). Accordingly, it is submitted that neither Caucasians nor non-Caucasians are entitled to any advantage in employment or subject to any disability because of race.

This constitutional mandate eloquently demonstrates an awareness that society's prejudice and intolerance will be terminated only by the abolition of distinctions based upon race and other impermissible characteristics.[13] Conversely, racial

10. "[W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classification "constitutionally suspect," *Bolling* v. *Sharpe,* 347 U. S. 497, 499; and subject to the 'most rigid scrutiny,' *Korematsu* v. *United States,* 323 U. S. 214, 216; and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose. *Hirabayashi* v. *United States,* 320 U. S. 81, 100." *McLaughlin* v. *Florida,* 379 U. S. 184, 191, 192 (1964).

11. See *Loving* v. *Virginia,* 388 U. S. 1, 10 (1967); *Hodges* v. *United States, supra.*

12. *Hughes* v. *Superior Court,* 339 U. S. 460 (1950). See Kaplan, *Equal Justice* in *an Unequal World,* 61 Nw. U. L. Rev. 363, 382 (1966).

13. Senator Charles Sumner of Massachusetts, the chief architect of the equal protection clause, defined his concept of equal protec-

bigotry will be resurrected and perpetuated by legislative policy or judicial decisions whose effect is to classify persons according to race and inflict disabilities in the employment area upon a person solely because of his immutable and supposedly irrelevant racial characteristics.

The decision below has ignored these precepts and by its construction of the Civil Rights Acts of 1866 and 1964 has assumed that Congress would enact legislation that contravenes the Constitution. Thus, the decision below has interpreted these Acts to classify persons according to their race and to deny only to Caucasians—because of their race—actionable rights to protest employment discrimination. That is, the court below has held that Title VII and § 1981 confer no actionable rights on Caucasians if they seek to protest racial discrimination against them in the employment area. However, that court necessarily recognizes that these laws do confer substantive rights on similarly circumstances blacks. *Johnson* v. *Railway Express Agency*, *supra*. Thus, according to the statutory construction of the court below, a qualified black who is denied a job that is then awarded to a Caucasian, has an actionable right under the Civil Rights Acts to protest discrimination; on the other hand, a qualified Caucasian similarly denied a job that is then awarded to a black has no actionable right under these Acts to protest discrimination in an argument before the Supreme Court of Massachusetts in *Roberts* v. *Boston*, 59 Mass. (5 Cash.) 198 (1849) in an effort to overturn the state's segregated school law:

> "He may be poor, weak, humble, or black—he may be of Caucasian, Jewish, Indian, or Ethiopian race—he may be of French, German, English, or Irish extraction, but before the Constitution of Massachusetts all these distinctions disappear. He is not poor, weak, humble, or black; nor is he Caucasian, Jew, Indian, or Ethiopian; nor is he French, German, English or Irish; he is a Man, the equal of all his fellow-men." 2 Works of Charles Sumner, 341-342 (1974).

Though Sumner lost the case, the segregation law was immediately thereafter repealed, and Sumner's concept became the basis of the equal protection clause. Frank and Munro, *The Original Understanding of Equal Protection of the Laws*, 1972 Wash. U. L. Q. 421 (1972).

tion. The decision below has thus construed the Civil Rights Acts so as to violate the Constitution by depriving only Caucasians of substantive rights to protest job discrimination and only because they are Caucasians. Accordingly, the statutory construction of the decision below should not be endorsed by the Court.

The effect of the decision below is not limited to denying only Caucasians the right to redress racial discrimination directed against them. In a very real sense this decision denies Caucasians equal employment opportunities. By construing the Civil Rights Acts to deny Caucasians protection against racial discrimination in employment, the court has invited the application of coercive pressure against employers in order to obtain preferences in employment for blacks or other non-Caucasians.[14] Given the finite number of available jobs, such a practice would perforce reduce the number of job opportunities for which Caucasians could compete—solely on account of their race.[15] Insofar as such racial preferences would deny employment to qualified Caucasians, these preferences also compel reverse discrimination. It is submitted that

14. Cf., *WMRA Broadcasting Co., et al.* v. *Hawthorne, et al.*, *supra*. In that case the defendants included black employees of WRMA and the president of the Alabama Action Committee, a group dedicated to secure employment for blacks and which had been long active in boycotting retail establishments to achieve its goal. These defendants sought to force plaintiff employer WRMA to discharge its station manager, who was also a plaintiff, only because he was a Caucasian. To obtain its objective, defendants engaged in mass picketing at the station's premises and in addition, threatened advertisers on the station in order to coerce them to discontinue advertising. While the court in *WMRA* found that plaintiffs had an actionable right under § 1981, a contrary holding—which would have been affirmed by the court below—would have permitted the defendants to continue their campaign with impunity and may well have resulted in the discharge of the Caucasian manager who, having been discharged solely on the basis of race, would have no redress. Cf., *Central Presbyterian Church* v. *Black Liberation Front, supra*.

15. *DeFunis* v. *Odegaard, supra*. It is not difficult to believe that the practice discussed in *DeFunis* could be imported from the academic to the commercial scene in an attempt to eradicate past general discrimination.

any racial classification is constitutionally impermissible, that "[t]here is no constitutional right for any race to be preferred," and that no governmental purpose—even that of eradicating past general minority discrimination—can justify the imposition of racially oriented hiring preferences that deny employment to qualified Caucasians.

However, unless Caucasians have an actionable right under the Civil Rights Acts to protest reverse discrimination—and the decision below denies this right—either this right to be free from such discrimination does not exist after all, or, if it exists, it has been rendered nugatory.[16] As stated, the *amicus* believes that the right to be protected from reverse discrimination does exist under the Constitution; accordingly, this right must be recognized by the Civil Rights Acts, the enforcing legislation of the applicable amendments.

For all these reasons, the decision below must be reversed. In so doing, this Court should reaffirm its pronouncements of *Griggs* that the right to work depends upon fitness for the work and on an equal right of all, regardless of race to compete on an open market, and does not depend upon membership in a particular racial group; this Court should strees that the Civil Rights Acts command "the elimination of racial barriers, not their creation in order to satisfy [a] theory as to how society ought to be organized."[17] In view of the decision below, such a restatement is necessary.[18]

While this Court has recently determined to consider certain problems related to reverse discrimination, *e.g., Franks* v. *Bowman Transportation, Inc., et al., supra,* the "slate is not entirely clean." *Defunis,* Mr. Justice Douglas, opinion at 337. In *Hughes* v. *Superior Court, supra,* this Court reviewed the contempt convictions of pickets who sought to compel an employer to prefer blacks to Caucasians in hiring clerks in order

16. See footnote 5.

17. *DeFunis,* opinion of Mr. Justice Douglas, at 342.

18. It is, of course, apparent that employers, conscious of productivity and efficiency, desire to hire the best qualified.

to ensure that fifty percent of his employees were black. This Court found that such picketing could be enjoined, since it was designed to "make the right to work for Lucky dependent not on fitness for the work nor on an equal right of all, regardless of race, to compete in an open market, but, rather, on membership in a particular race." This Court recognized that if the pickets were upheld in their demand, "then other races, white, yellow, brown, and red, would have equal rights to demand discriminatory hiring on a racial basis, 339 U. S. at 463-464. This Court then noted:

> "[t]o deny to California the right to ban picketing in the circumstances of this case would mean that there could be no prohibition of the pressure of picketing to secure proportional employment on ancestral grounds of Hungarians in Cleveland, of Poles in Buffalo, of Germans in Milwaukee, of Portugese in New Bedford, or Mexicans in San Antonio, of the numerous minority groups in New York, and so on through the whole gamut of racial and religious concentrations in various cities." *Ibid.*

To permit employment opportunities to be parceled out, regardless of qualifications, according to some fixed notion on how society should be structured is to soon involve the courts in the business of resolving the competing claims of many separate groups, each clamoring for favored treatment and each asserting what it deems to be a plethora of past grievances to support its claims. A resurgence of the pre-*Brown*[19] era "us" and "them" concepts will likely follow.[20]

19. *Brown* v. *Board of Education,* 347 U. S. 483 (1954). This decision emphasized that all racial discrimination is simply wrong and is thus proscribed.

20. Once minority preference quotas are approved in the employment field, preferences in the political arena may be sought. It may well be urged that the one-man one-vote principle should be no more durable than color-blindness in employment, and that the non-Caucasian needs two votes to "catch up". Thus, sanctioning quotas in one area has lasting and far reaching ramifications in others, and all such preferences undermine the constitutional precepts of our government.

In sum, this Court should not sustain the racial classification and barrier to Caucasians imported into the Civil Rights Acts by the decision below. Such an interpretation of those Acts is neither compelled nor justified and could well invite reverse racial discrimination in employment, attended by a resurgence of racial antagonism, with the goal of equal opportunity an unfortunate casualty. Rather, in determining the meaning of these Acts, this Court should be guided by the mandate of the Constitution, the intent of the architects of these Acts and by the needs of the present, "the exigencies of social life".[21] All point to one result: actionable rights under § 1981 and Title VII are to be accorded to all persons, Caucasian and non-Caucasian alike. This rule alone is the sensible rule for the governance of our nation, and the attainment of our goal of equal opportunity.

CONCLUSION

For all the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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21. "Consequences cannot alter statutes, but may help to fix their meanings." Cardozo, *The Growth of the Law*, p. 75, 112.